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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 337

HERMANN MAX SCHWINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No written opinion was rendered by the District Court. Its oral opinion appears at R. 56–60 and its findings of fact, conclusions of law, and final decree at R. 17–21. The opinion of the Circuit Court of Appeals (R. 72–77) is reported in 112 F. (2d) 74.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 10, 1940 (R. 78), and a petition for rehearing denied June 20, 1940 (R. 79). The petition for a writ of certiorari was filed August

14, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is whether the petitioner's naturalization certificate was illegally or fraudulently procured within the meaning of U. S. C., Title 8, Section 405.

STATUTES INVOLVED

The pertinent statutory provisions are copied in the Appendix, *infra,* pp. 18–19.

STATEMENT

The Government on December 17, 1938, instituted in the United States District Court for the Southern District of California a suit in equity seeking the cancellation of the petitioner's certificate of naturalization on the grounds that it was fraudulently and illegally procured (R. 2–7).

It appears from the record that on April 22, 1925, the petitioner, then a citizen of Germany, filed in an Ohio state court a declaration of intention to become an American citizen. On April 13, 1932, the petitioner filed his petition for citizenship in the United States District Court for the Southern District of California at Los Angeles. That court, on July 22, 1932, entered an order admitting the petitioner to citizenship and a certificate of citizenship was issued to him by the clerk of the court (R. 2–3, 8).

In his petition for citizenship the petitioner alleged, under oath, that he lawfully entered this country for permanent residence on December 26, 1924, and that he had resided continuously in the United States since December 26, 1924, and in the County of Los Angeles continuously since October 1926 (R. 3). In verification of the petition there were attached the affidavits of one Gerhard Foerstel and one George E. Martens, each of whom alleged that he had personally known the petitioner to have resided in the United States and the County of Los Angeles continuously since April 12, 1927, and had personal knowledge that during all this period petitioner had been a person of good moral character, attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States, and was, in their opinion, qualified in every way to be admitted as a citizen of the United States (R. 3–4, 8). At the examination conducted by a United States Naturalization Examiner on April 13, 1932, in connection with the filing of the petition, the petitioner and Foerstel and Martens testified under oath in accordance with the statements contained in the petition and supporting affidavits (R. 3, 8, 36–38).

The petitioner filed an answer to the Government's bill of complaint to cancel his naturalization certificate, in which he advanced various defenses (R. 7–12). The case was heard upon a stipulation of facts and certain testimony (R. 25–54).

The stipulation showed that, contrary to the statements made by petitioner and his two supporting witnesses in the naturalization proceeding, the petitioner first came to Los Angeles County on October 1, 1927, and not in October 1926, and that he first became acquainted with Foerstel and Martens in March 1928 and not in April 1927 (R. 26). Since the testimony discloses that the petitioner offered no witnesses at the naturalization proceeding other than Foerstel and Martens (R. 38), it is apparent that he did not produce any witnesses at that time as to his residence or qualifications from April 13, 1927,[1] to March 1928, a period of almost a year.

It was also stipulated that prior to the time petitioner went to Los Angeles County he resided in Ohio and that he lived there until April 30, 1927; that between that time and September 1, 1927, he resided in various parts of the western United States other than California (R. 26). In the stipulation it was agreed that one William Linder, then a resident of Akron, Ohio, and one Max Voght, then a resident of Santa Monica, California, would testify, if called, that they were residents of Akron, Ohio, during the residence there of petitioner and that while the petitioner resided there (from early in 1925 until April 30, 1927) he possessed the

[1] That is, five years prior to the filing of his petition for naturalization (see U. S. C., Title 8, Section 382; Appendix, *infra*, pp. 18–19.

necessary qualifications for citizenship (R. 26–27). It is evident that these witnesses, if called, would have supplied testimony as to the petitioner's residence in the United States and his qualifications only for the first 17 days of the necessary five-year period, leaving a gap of ten months or more unaccounted for.

It was further stipulated that the petitioner, if called to the stand, would testify that at the time of the naturalization proceeding he believed that he had been a resident of Los Angeles County for more than five years, and that when he procured the affidavits and testimony of Foerstel and Martens at that proceeding he believed that he had known them for a period in excess of five years (R. 28).

It was also stipulated that the petitioner, at the time he filed his petition for naturalization, had, in fact, been a resident of and within the continental boundaries of the United States for a continuous period in excess of five years.

The District Court entered findings of fact and conclusions of law in which it held that the petitioner had illegally and fraudulently procured his certificate of citizenship (R. 17–19, 62). A decree cancelling the certificate was accordingly filed (R. 20).

In its findings the District Court found to be not true, for lack of evidence, the defense contained in petitioner's answer that at the time he was admitted to citizenship the prescribed qualifications

for citizenship did exist in fact (R. 9–10, 18). The basis for this finding has been sufficiently indicated.

The court also found not to be true the defense contained in petitioner's answer that at the time of the naturalization proceeding petitioner believed that he had resided continuously in Los Angeles County since October 1926, and that he then believed that he had known Foerstel and Martens, his two supporting witnesses, for a period of five years or more (R. 10, 11, 18). This finding was based upon petitioner's own testimony (R. 41–53), in which it was disclosed, *inter alia,* that while he regarded the obtaining of citizenship as a very important matter, he made no effort to check and verify his period of residence in Los Angeles County before filing his petition, although there were available to him sources from which he could very readily have determined his length of residence in that County (R. 42–45, 47). It also appeared from petitioner's testimony that he did not remember whether he had discussed with his supporting witnesses the length of time he had known them (R. 51–52).

The District Court in its oral opinion stated that the petitioner by his own testimony "condemns himself" (R. 60). The court said (R. 59):

> According to the testimony of the Defendant, he was apparently able to speak fluent English when he arrived. He apparently made himself thoroughly proficient; he was able to deal with the public without a handi-

cap; he had shown that he was thoroughly proficient in figures. This training which he had tends to exclude the idea that he inadvertently made a mistake and the testimony shows that he made no effort to determine his length of residence in the County of Los Angeles and State of California or to make any change whatever in the facts as set out by his petition. He testified that he procured full information as to the requirements for citizenship and that his knowledge was fairly extensive.[2]

On appeal the Circuit Court of Appeals for the Ninth Circuit unanimously affirmed the decree of the District Court (R. 72–77).

ARGUMENT

Since U. S. C., Title 8, Section 405 (Appendix, *infra*, p. 19), permits the cancellation of a certificate of naturalization on the ground that it was illegally procured or on the ground that it was

[2] After the submission of proof and prior to the District Court's findings, that court permitted the Government, without objection, to amend its complaint by adding a paragraph which stated, *inter alia*, that in order to induce the Government to issue the certificate of naturalization the petitioner "recklessly, carelessly, and negligently and without any regard whatsoever as to the truth thereof and without making any investigation or research from known sources then available to him" misrepresented in his petition for naturalization his period of continuous residence in Los Angeles County and procured the false affidavits and representations of Foerstel and Martens as to the length of time they had known him (R. 14–16).

fraudulently procured, it follows that the courts below were correct in sustaining the cancellation of petitioner's certificate if either ground was established.[3]

(a) Petitioner contends, in effect, that the Government cannot secure the cancellation of a certificate of naturalization on the ground that it was illegally procured merely by showing that there was a noncompliance with the terms of the naturalization statute; that it must go further and prove affirmative wilful misconduct or some positive act of a sinister character (Pet. 19–24). In this connection the petitioner asserts that the record discloses that he possessed all the qualifications for citizenship; that, although he did not produce them at the naturalization hearing, he had available witnesses who could have testified that he had continuously resided in this country for five years prior to the filing of his petition; and that the proof showed and the District Court was of the opinion that he had made an unintentional and honest mistake[4] with reference to his acquaintance with his supporting witnesses during the required five-year statutory period. (See, e. g., Pet. 3, 15–16, 20, 22, 36–37.)

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[3] While the Circuit Court of Appeals in its opinion stated that the Government in its oral argument presented only the ground that the petitioner's certificate of citizenship was secured by fraud (R. 74), it should be noted that the Government in its brief in that court also urged that the certificate was illegally procured (pp. 18–22).

[4] *Cf.*, however, Pet. 24.

While it is apparent from the Statement (*supra*, pp. 3–7) that these assertions are without basis in the record, they would be of no avail to the petitioner even if they possessed foundation, since the decisions of this Court make it clear that a certificate of naturalization may be cancelled as having been illegally procured if any of the statutory requirements are not met. *Maney* v. *United States*, 278 U. S. 17;[5] *United States* v. *Ness*, 245 U. S. 319;[6] *United States* v. *Ginsberg*, 243 U. S. 472.[7] Thus in the *Ginsberg* case it was said (pp. 473, 475):

> This [the naturalization act] specifies with circumstantiality the manner ("and not otherwise")[8] in which an alien may be admitted to become a citizen of the United States; * * * form and contents of his sworn petition to the court and witnesses by which it must be verified; form of oath to be taken in open court; necessary proof concerning residence, character, etc.
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> * * * * *

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[5] In this case the certificate of arrival was not filed with or attached to the petition for naturalization, as required by U. S. C., Title 8, Section 380, but was filed over two months prior to the naturalization hearing.

[6] In this case the certificate of arrival was likewise not filed with the petition for naturalization.

[7] The final hearing upon the petition for naturalization in this case was not held entirely in open court, as required by U. S. C., Title 8, Section 398.

[8] U. S. C., Title 8, Section 372, provides that "An alien may be admitted to become a citizen of the United States in the manner indicated under Sections 372 to 394 of this title *and not otherwise*." [Italics ours.]

> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 [U. S. C., Title 8, Section 405] and demand its cancellation unless issued in accordance with such requirements.

And in the *Ness* case, wherein it was urged that the certificate of arrival was merely a form of proof which the naturalization court had power to dispense with for cause, this Court, in rejecting the argument, said (pp. 324–325):

> * * * in view of the large number of courts to which naturalization of aliens was entrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the code prescribed also the exact character of proof to be adduced. * * * Naturalization granted without the certificate having been filed, is, therefore, "illegally procured" * * *.[9]

U. S. C., Title 8, Section 382 (Appendix, *infra*, pp. 18–19), requires that the applicant for citizenship prove at the naturalization hearing by at least two credible witnesses, citizens of the United

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[9] While the petitioner cites certain lower Federal Court decisions which contain language apparently supporting his position, they plainly are in conflict with the decisions of this Court and are, consequently, entitled to no weight.

States, that he has resided within the United States continuously for at least five years prior to the date of his petition, and that all during this period the applicant has behaved as a person of good moral character, attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States. In the instant case the two witnesses offered by petitioner at the naturalization hearing admittedly had known the petitioner only for about four years, not for the statutory five-year period. There was, accordingly, a hiatus of almost a year, as to which there was no proof at the naturalization proceeding as to the petitioner's continuous residence in this country or as to his qualifications for citizenship. Under the decisions of this Court the petitioner's certificate was consequently, illegally procured within the meaning of U. S. C., Title 8, Section 405.

(b) Petitioner contends that the bill of complaint failed to state and the Government failed to prove a cause of action for cancellation on the ground that his certificate was fraudulently procured.[10] This contention is, we submit, without merit.

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[10] In this connection petitioner asserts that he first learned from the opinion of the Circuit Court of Appeals that the Government sought to cancel his certificate on the ground of fraud, and, hence, was deprived of the opportunity of meeting this issue (Pet. 29–34). This assertion is clearly without foundation. The Government's bill of complaint alleged that the naturalization certificate, because of matters earlier set forth in the bill, "is subject to cancellation as fraudulently and illegally procured" (R. 6). In an excess

The complaint clearly specified that the petitioner falsely stated in his petition for naturalization and falsely testified at the naturalization hearing that he had resided in Los Angeles County continuously since October 1926. It also alleged, in effect, that he procured and submitted with his petition the affidavits of Foerstel and Martens to the effect that they had known him for the required five-year period and that they knew that during all of that period he possessed the required qualifications, whereas, in fact, they had known him for considerably less than that period (R. 3–5). These allegations were supplemented by the allegations in the amendment to the complaint that the petitioner

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of caution counsel for the Government, as he was privileged to do under Rule 15 (b) of the Rules of Civil Procedure, filed, without objection by the petitioner, an amendment of the complaint prior to the entry of the decree (R. 14, 21), in order to conform the complaint to the proof. This amendment, following a familiar formula for fraud, alleged, *inter alia*, that the petitioner "recklessly, carelessly and negligently, and without any regard whatsoever as to the truth thereof and without making any investigation or research from known sources then available to him," misrepresented his period of residence in Los Angeles County and procured the false affidavits and representations of Foerstel and Martens as to the length of time they had known him (R. 15). Moreover, petitioner explicitly excepted to the finding of the trial court that the certificate "was fraudulently and illegally procured" (R. 62). Finally, the issue of fraud was discussed in the Government's brief filed with the Circuit Court of Appeals at pp. 11–18.

"recklessly, carelessly and negligently and without any regard whatsoever as to the truth thereof and without making any investigation or research from known sources then available to him" misrepresented in his petition for naturalization his period of continuous residence in Los Angeles County and procured false affidavits and representations of Foerstel and Martens as to the length of time they had known him (R. 15). Clearly, the complaint sufficiently alleged a cause of action for cancellation of the petitioner's certificate of citizenship on the ground of fraud. In *Cooper* v. *Schlesinger,* 111 U. S. 148, 152, 155, this Court approved a charge which, in part, stated:

> It is not necessary, to constitute a fraud, that a man who makes a false statement should know precisely that it is false. It is enough if it be false and if he made it recklessly, and without any honest belief in its truth, or without reasonable ground for believing it to be true, and be made deliberately and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted upon, and has been acted upon by him accordingly. * * *

See also *Bentel* v. *United States,* 13 F. (2d) 327 (C. C. A. 2d); *Panther Rubber Mfg. Co.* v. *Commissioner,* 45 F. (2d) 314 (C. C. A. 1st). Indeed, this being a proceeding in equity, the complaint,

in reality, set out more than is required to state a case of fraud. (See cases cited *infra*.)

It is apparently the position of the petitioner that the Government did not prove that he fraudulently procured his certificate of citizenship because the evidence, at most, disclosed that he was guilty merely of an unintentional and inadvertent mistake as to his residence in Los Angeles County and the time he had known Foerstel and Martens. The stipulation and the evidence clearly justified the trial court in holding that there was no inadvertent mistake (R. 59–60). In these circumstances there can be no question that the proof established fraud.

However, a case of fraud was made out even if "unintentional mistake" be assumed. A proceeding to cancel a certificate of citizenship on the ground that it was fraudulently procured is a proceeding in equity (*Luria* v. *United States*, 231 U. S. 9, 27), and "is governed by the rules of equity pleading and practice" (*United States* v. *Woerndle*, 288 Fed. 47, 48 (C. C. A. 9th). In equity it has been held that fraud exists where action is induced by misrepresentation, regardless of "whether the false representation * * * was made with knowledge of its falsity or was made with an honest belief that it was true." *New York Life Ins. Co.* v. *Miller*, 73 F. (2d) 350, 353 (C. C. A. 8th), and cases cited. Plainly, the petitioner's conduct came within this principle.

The Circuit Court of Appeals, however, applied a less stringent rule when it said (R. 74):

> Fraud includes the mistaken statements of material facts which induce action by the other party, where the truth of such facts is within the special means of knowledge of the declarant.

See *Panther Rubber Mfg. Co.* v. *Commissioner, supra*, at p. 316; *Smith* v. *O'Connor*, 88 F. (2d) 749, 750 (App. D. C.); *Mergenthaler Linotype Co.* v. *Evans*, 69 F. (2d) 287, 289 (C. C. A. 9th); *Nocatee Fruit Co.* v. *Fosgate*, 12 F. (2d) 250, 252 (C. C. A. 5th); *Bentel* v. *United States, supra*. The facts clearly bring the case within this rule. As the Circuit Court of Appeals said (R. 75–76): "Here the party seeking citizenship had adequate means of ascertaining the truth or falsity of the statements he and his witnesses made in the application, and could have avoided the false representations which accompanied his application to the court of the Nation whose beneficences he sought, by scarcely more than a casual checking of the facts." In the light of these facts and the authorities cited,[11] the courts

[11] The District Court cases upon which the petitioner relies were sufficiently differentiated in the opinion of the Circuit Court of Appeals (R. 75). *United States* v. *Rose*, 166 Fed. 999 (C. Ct. Ia.), which dealt solely with the sufficiency of the bill of complaint, is clearly distinguishable on its facts. Moreover, it does not appear that the principles of fraud applied in equity were called to the court's attention.

below were fully warranted in holding that the petitioner fraudulently procured his naturalization certificate.[12]

We submit, therefore, that the action of the District Court in ordering the cancellation of petitioner's certificate of citizenship is sustainable either on the ground that it was illegally procured or on the ground that it was fraudulently procured, or upon both grounds.

CONCLUSION

The case was correctly decided below and presents no important question of Federal law.

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[12] As is indicated in the Statement (*supra*, pp. 4–5), it was stipulated that one Linder and one Voght would, if called, testify that they had known the petitioner in Akron, Ohio, from early in April 1925 until April 30, 1927, and that at that time he possessed the necessary qualifications for citizenship. The petitioner contends that if he had been permitted to produce these witnesses at the trial, he would have established that all of the jurisdictional facts were in existence at the time the petition for naturalization was granted. He, therefore, urges that the trial court committed error in failing to pass upon his offer to produce these witnesses (Pet. 39–42). Suffice it to say that the facts to which these witnesses could have testified were already before the trial court by virtue of the stipulation, and that, as heretofore pointed out (*supra*, pp. 4–5), the testimony of these witnesses would still have left a gap of approximately 10 months of the prescribed five-year period as to which there was no proof as to petitioner's continuous residence in this country or as to his qualifications for citizenship. Moreover, deficiencies in the proof at the naturalization proceeding with reference to the requisite qualifications for citizenship cannot be supplied by a later offer of testimony. Cf. *Maney* v. *United States*, 278 U. S. 17.

There is involved no such conflict of decisions as would warrant the issuance of a writ of certiorari. We therefore respectfully submit that the petition should be denied.

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OCTOBER 1940.

APPENDIX

U. S. C., Title 8, Section 379:

* * * * *

As to each period of residence at any place in the county where the petitioner resides at the time of filing his petition, there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each has personally known the petitioner to have been a resident at such place for such period, and that the petitioner is and during all such period has been a person of good moral character.

U. S. C., Title 8, Section 382:

No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this section he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition, and the other qualifications re-

quired by this section during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by section 379 of this title to be included in the petition. If the petitioner has resided in two or more places in such county and for this reason two witnesses cannot be procured to testify as to all such residence, it may be proved by the oral testimony of two such witnesses for each such place of residence, in addition to the affidavits required by section 379 of this title to be included in the petition. At the hearing, residence within the United States but outside the county, and the other qualifications required by this section during such residence shall be proved either by depositions made before a naturalization examiner or by the oral testimony of at least two such witnesses for each place of residence.

* * * * *

U. S. C., Title 8, Section 405:

It shall be the duty of the United States district attorneys for the respective districts * * * to institute proceedings in any court having jurisdiction * * * for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured * * *.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1940